Filed 5/18/09 In re G.H. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re G.H., a Person Coming Under the Juvenile Court Law.	B210417 (Los Angeles County Super. Ct. No. CK71650)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Y.I., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Robert Stevenson, Juvenile Court Referee. Reversed.

Daniel G. Rooney, under appointment by the Court of Appeal for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Judith A. Luby, Deputy County Counsel, for Plaintiff and Respondent.

Y.I., the presumed father of G.H., appeals from the juvenile court's order declaring G.H. a dependent child of the court pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (g),[1] insofar as the order relates to him (as opposed to G.H.'s mother), contending the evidence is insufficient to support the court's jurisdictional findings. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

G.H., born in September 2006, and her half-sister C.H., born in February 2008, were removed from their mother's custody two days after C.H.'s birth when both C.H. and her mother, S.H. tested positive for methamphetamine/amphetamines in their systems. The petition filed by the Los Angeles County Department of Children and Family Services (Department) alleged, pursuant to section 300, subdivisions (b) (failure to protect) and (g) (no provision for support), S.H.'s current substance abuse led to C.H.'s positive toxicology screen, endangers the child's physical and emotional health and safety and places the child at risk of physical and emotional harm and damage (count b-1); S.H's history of substance abuse and current use of amphetamines and methamphetamine render her incapable of providing regular care for both G.H. and C.H. and endanger the children's physical and emotional health and safety and create a detrimental home environment (count b-2); C.H.'s father, C.S., also has a history of substance abuse and is a current user of methamphetamine, rendering him incapable of providing regular care for C.H. (count b-3); and Y.I., G.H.'s father, has failed to provide the child with the necessities of life including food, clothing, shelter and medical treatment, endangering G.H.'s physical and emotional health and well being and placing the child at risk of physical and emotional harm and damage (counts b-4 and g-1).[2]

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1 Statutory references are to the Welfare and Institutions Code.

2 Counts b-4 and g-1 also alleged Y.I.'s whereabouts were unknown. That allegation was struck by the court at the jurisdictional hearing after Y.I. was located at Centinela State Prison.

The detention report prepared by the Department indicated, in addition to her on-going substance abuse problem, S.H. had not obtained any prenatal care during her pregnancy with C.H. The maternal grandmother, with whom S.H., C.S. and the two children lived, was the main caregiver for G.H. The maternal grandmother stated, however, as the child got older, caring for her was becoming increasingly difficult. The detention report also stated C.S. had recently been released from jail, where he had been held for approximately four months because of his methamphetamine use. C.S. admitted he used, but denied he sold, illegal drugs. S.H. advised the Department Y.I. was M.H.'s biological father and stated he "has been in prison for several years already and expects to be in prison for several more years." She said she did not know where Y.I. was incarcerated.

The juvenile court ordered the children detained on February 14, 2008 and directed G.H. and C.H. be placed in the same foster home if feasible. The court determined Y.I. was at Centinela State Prison and issued orders for him to be brought to court for the next hearing.

In its jurisdiction/disposition report for the March 13, 2008 hearing the Department advised the court S.H. admitted she had used illegal drugs for at least the last three years. S.H. said she had separated from Y.I. when he was arrested and sent to prison "a few years ago" and stated she had no contact with him "for a few years." She did not know his current prison location. The maternal grandmother confirmed Y.I. was in prison somewhere in California and had not provided any care for G.H. On March 13, 2008 the court set the matter for a contest. On April 7, 2008 the court went forward with the jurisdiction hearing as to S.H. and C.S., but deferred ruling on the allegations in the petition relating to Y.I. to give his court-appointed lawyer time to contact him.

Based on the material submitted by the Department and by S.H. and C.S., the court found G.H. and C.H. were children described by section 300, subdivision (b), due to S.H.'s and C.S.'s history of drug abuse and on-going use of illegal drugs. The court removed both children from the care of S.H. and C.S. and declared them to be dependents

of the juvenile court. Family reunification services were ordered: S.H. and C.S. were directed to participate in drug rehabilitation and testing; visits with the children were to be monitored. None of these findings or orders is at issue in this appeal.

At a continued jurisdiction/disposition hearing on May 30, 2008 Y.I. appeared in custody. The court found him to be G.H.'s presumed father. Y.I.'s lawyer asked for a further continuance to allow him to confer with Y.I. regarding the allegations in the Department's petition and also advised the court a paternal aunt, Judy I., was available to care for G.H. in the event S.H. did not reunify with the child. Y.I. told the court he was not scheduled to be released from prison, where he was serving a sentence for burglary, until 2012 or 2013.

Y.I. again appeared in custody at the hearing on July 21, 2008. The Department's reports were admitted into evidence, and its counsel stated it had no further evidence. Y.I.'s motion to dismiss the counts directed to him for lack of evidence pursuant to section 350, subdivision (c), was denied. The court explained S.H.'s and the maternal grandmother's statements they had not had any contact with Y.I. for several years were sufficient to support an inference he had not provided support for the child during that time: If Y.I. had provided "any kind of support, there would have been contact."

Y.I. then testified he lived with S.H. from 2005 through his incarceration in early 2006. He was released about one month after G.H.'s birth in September 2006 and again lived with S.H.—and with G.H.—for about three months until he returned to prison in November or December 2006 (when G.H. was three months old). Y.I. insisted he had provided G.H. with food and clothing and had taken her to medical appointments during that period. After he went back to prison, he wrote S.H. many times and also contacted his sister, G.H.'s paternal aunt, Judy I., and asked her to check up on G.H. and to help take care of her while he was in prison. Judy I. told Y.I. she would try to help G.H., but Y.I. acknowledged he did not know if she had actually done so. Y.I. also conceded he had not provided or made payments for food, clothing, rent or medical treatment for G.H. after he returned to prison in November or December 2006. Finally, Y.I. testified the

Department had never contacted him about the allegations in the petition and had never spoken to him about placing G.H. with his sister.

Following Y.I.'s testimony and argument from counsel, the court sustained both counts b-4 and g-1, finding Y.I. had failed to provide for G.H. while he was incarcerated. The court explained, "[I]f dad was that concerned about caring for his child while he was in custody, to me he would have told his sister, sister, you need to make sure my child's okay. I want you to find out and let me know what's going on with my child. I want you to call the social worker. I want you to call the mother. You just can't just say, you know, sister, go see how the child is doing." The court also indicated it did not credit Y.I.'s testimony he had written 40 letters to S.H. while he was in prison, noting S.H. had testified there had been no contact and she did not know where Y.I. was imprisoned, finding "There has been no contact with her and the child."

At the subsequent disposition hearing on August 21, 2008 the court ordered no reunification services be provided to Y.I. pursuant to section 361.5, subdivision (e)(1), finding it would be detrimental to G.H. to provide reunification services to Y.I. in prison and noting Y.I. would be incarcerated much longer than the potential reunification period. The court also ordered the Department to evaluate the paternal aunt as a possible placement.

CONTENTIONS

Y.I. contends the evidence presented to the juvenile court is insufficient to support the court's jurisdictional findings as they relate to him. Y.I. acknowledges G.H. was properly declared a dependent child of the juvenile court under section 300, subdivision (b), based on the court's findings regarding S.H.'s and C.S.'s history of substance abuse and current use of illegal drugs. (See *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397 ["[A] jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. [Citations.] This accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent."].)

Moreover, he does not challenge any of the disposition orders, including G.H.'s suitable placement in foster care or the court's denial of reunification services for him. Nonetheless, because of the potential impact of the juvenile court's findings on future placement and reunification orders in this or subsequent proceedings, we agree with Y.I. his challenge to the sufficiency of the evidence to support the court's findings is properly before us. (See *In re John S.* (2001) 88 Cal.App.4th 1140, 1143; *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1193.)

DISCUSSION

1. *Standard of Review*

We review the juvenile court's jurisdiction and disposition findings for substantial evidence. (*In re David M.* (2005) 134 Cal.App.4th 822, 828; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) Under this standard we examine the whole record in a light most favorable to the findings and conclusions of the juvenile court and defer to the lower court on issues of credibility of the evidence and witnesses. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393; *In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734.) We determine only whether there is any substantial evidence, contradicted or uncontradicted, that supports the court's order, resolving all conflicts in support of the determination and indulging all legitimate inferences to uphold the court's order. (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547; *In re John V.* (1992) 5 Cal.App.4th 1201, 1212; *In re Eric B.* (1987) 189 Cal.App.3d 996, 1004-1005.) "However, substantial evidence is not synonymous with *any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, '[w]hile substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].' [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.'" (*In re Savannah M.*, at pp. 1393-1394; accord, *In re Albert T.* (2006) 144 Cal.App.4th 207, 216-217.)

2. *The Jurisdictional Findings as to Y.I. Under Section 300, Subdivisions (b) and (g) Are Not Supported by Substantial Evidence*

Substantial evidence supports the juvenile court's finding that, while he was incarcerated, Y.I. failed to provide G.H. with adequate food, clothing, shelter or medical treatment. The question remains, however, whether that finding is sufficient to sustain counts b-4 and g-1 of the section 300 petition filed by the Department in this case.

a. *Section 300, subdivision (b)*

A juvenile court may determine a child is subject to the court's jurisdiction if it finds by a preponderance of the evidence that "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness," as a result of a parent's "willful or negligent failure . . . to provide the child with adequate food, clothing, shelter or, or medical treatment." (§ 300, subd. (b).) "The statutory definition consists of three elements: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820; accord, *In re David M., supra*, 134 Cal.App.4th at p. 829.)

The fundamental problem with the court's finding under section 300, subdivision (b), as to Y.I. is there was no evidence his failure to provide for G.H. was causally related to any actual harm or substantial risk of harm to the child. It was S.H.'s and C.S.'s history of substance abuse and current use of illegal drugs that exposed G.H. to a substantial risk of harm, amply justifying the exercise of dependency jurisdiction, not any failure by Y.I. to support the child. (See *In re David M., supra*, 134 Cal.App.4th at p. 829 [reversing jurisdictional finding under § 300, subd. (b), because "the evidence of mother's mental and substance abuse problems and father's mental problems was never tied to any actual harm to [the children] or to a substantial risk of serious harm"]; see also *In re Janet T.* (2001) 93 Cal.App.4th 377, 388 ["before courts may exercise jurisdiction under section 300, subdivision (b) there must be evidence 'indicating the child is exposed to a substantial risk of serious physical harm or illness'"]; accord, *In re Savannah M., supra*, 131 Cal.App.4th at p. 1396.)

On appeal the Department attempts to defend the subdivision (b) finding by arguing Y.I. willfully or negligently failed to adequately supervise or protect G.H by leaving her with S.H., who had been using illegal drugs since she was in high school, when he went to prison. Although, if pleaded and proved, that allegation would certainly support the exercise of juvenile court jurisdiction under section 300, subdivision (b), the Department did not assert this theory below; and the juvenile court did not sustain count b-4 in the petition—which alleges only the failure to provide the necessities of life—on that basis. On the record before us we can only conclude the Department failed to prove the grounds it asserted and failed to assert the grounds it might have proved. (See *In re Janet T., supra,* 93 Cal.App.4th at p. 392.)

b. *Section 300, subdivision* (*g*)

Section 300, subdivision (g), provides the juvenile court may adjudge any child a dependent child of the court if the child "has been left without any provision for support; . . . the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child; or a relative or other adult custodian with whom the child resides or has been left is unwilling or unable to provide care or support for the child, the whereabouts of the parent are unknown, and reasonable efforts to locate the parent have been unsuccessful." No separate allegation the child is currently suffering physical harm or is at risk of such harm is required. (See, e.g., *In re Athena P.* (2002) 103 Cal.App.4th 617, 630 [substantial evidence supports finding child left with grandparents was left without provision for support under § 300, subd. (g), because caregivers had no authority to consent to medical treatment or enroll child in school].)

As filed by the Department, count g-1 of the section 300 petition alleged, in language identical to that in count b-4, Y.I. "has failed to provide the child [G.H.] with the necessities of life including food, clothing, shelter and medical treatment." The petition does not specifically allege that G.H. was left without any provision for support (that is, that S.H. and the maternal grandmother were not supporting her) or that Y.I. is incapable or unwilling to adequately arrange for the care of G.H. while incarcerated.

Again, we agree with the Department substantial evidence supports the juvenile court's finding Y.I. did not contribute to G.H.'s support while he was in prison, as well as its finding Y.I. did not, in fact, effectively arrange for his sister or any other responsible adult to care for G.H. during his imprisonment. However, evidence Y.I. did not arrange for the care of the child prior to the jurisdiction hearing does not satisfy the Department's burden of providing Y.I. cannot arrange for that care as required by section 300, subdivision (g).

The Court of Appeal in *In re Aaron S.* (1991) 228 Cal.App.3d 202, 208, explained, "[S]ection 300, subdivision (g) applies when, at the time of the hearing, a parent has been incarcerated and does not know how to make, or is physically and mentally incapable of making, preparations for the care of his or her child." Although the complete absence of any evidence the incarcerated parent was interested in the welfare of his children may be "sufficient for the juvenile court to infer that he either could not or was incapable of making preparations for their care" (*In re James C.* (2002) 104 Cal.App.4th 470, 484), here Y.I. identified his sister, Judy I., as a possible caregiver, advising the court at the May 30, 2008 hearing she was available to care for G.H. in the event S.H. did not reunify with the child. Indeed, the juvenile court in its disposition order directed the Department to investigate the possibility of such a placement.[3] Because it was the Department's burden to prove Y.I. could not now arrange for the care of G.H., focusing solely on what Y.I. had done in the past in failing to provide for G.H. or to arrange for her care, rather than what he could do when confronted with G.H.'s removal from S.H. because of her on-going drug problem, was error: "There is no 'Go to jail, lose your child' rule in California. [Citation.] If [the mother] could *arrange for* care of S. during the period of her incarceration, the juvenile court had no basis to take jurisdiction in this case . . . . [I]t

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[3] The decision whether to place a dependent child with a relative caregiver, of course, involves different considerations than evaluating whether an incarcerated parent has made adequate alternative arrangements for the care of his or her child. (See *In re Summer H.* (2006) 139 Cal.App.4th 1315, 1333-1334.)

is irrelevant that [the mother] had not already arranged for S.'s care at the time of her incarceration. Instead, the issue is whether, as of the time of the jurisdictional hearing, she could *arrange* for the care." (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077-1078.)

The Department observes the record in this case compels the conclusion placement with Y.I., the noncustodial, incarcerated father, would be detrimental to Y.I. no matter what plan he had for his daughter. (See § 361.2, subd. (a) [court must determine whether placement with noncustodial parent would be detrimental to the child's safety, protection or physical or emotional well-being].) We do not disagree. But the limited issue presented by Y.I. is whether the jurisdictional finding is supported by the evidence, not whether the ultimate disposition orders entered by the juvenile court are appropriate. On that question, we agree with Y.I.

DISPOSITION

The juvenile court's jurisdictional findings as to Y.I. are reversed. Because Y.I. does not challenge the court's exercise of jurisdiction over G.H. or any of the disposition orders, including G.H.'s placement in foster care or the court's denial of reunification services for him, this reversal does not require reconsideration of other existing orders. However, further proceedings in this matter are to be conducted consistently with this opinion.

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PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.